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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re N.B. et al., Persons Coming
Under the Juvenile Court Law.

B290610

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

(Los Angeles County
Super. Ct.
No. 18CCJP01713A&B)

Plaintiff and Respondent,

v.

J.B. et al.,

Defendants and Appellants.

APPEALS from orders of the Superior Court of Los Angeles County, Kristen Byrdsong, Commissioner. Affirmed in part and reversed in part.

Christine E. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant J.B.

Jill Smith, under appointment by the Court of Appeal, for
Defendant and Appellant M.E.

Tarkian & Associates and Arezoo Pichavai for Plaintiff and
Respondent.

The juvenile court sustained a petition naming J.B.
(mother) and M.E. (father), removed two-year-old N.B. and four-
month-old K.B. from mother's custody to place them with father,
and ordered father to participate in family maintenance services.
The parents separately appeal. We affirm the jurisdiction
findings but reverse the order removing the children from
mother's custody.

FACTUAL AND PROCEDURAL BACKGROUND

I. Mother

In April 2017, the Department of Children and Family
Services (the Department) received a referral alleging that
mother was living in a motel room and using crystal
methamphetamines in the presence of N.B., then age 1. The
reporter indicated that N.B. was seen dirty, unbathed, and
unkempt. The investigating social worker "detected" that the
caller was jealous about the possibility of mother and father
reuniting and found N.B. to be clean and developmentally on
target. Mother declined to submit to an on-demand drug test.
The Department concluded that the allegations were unfounded.

Ten months later in February 2018, however, K.B.
produced a positive toxicology screen for methamphetamines at
his birth. The hospital notified the Department.

Mother told two stories about how she ingested
methamphetamines the night before K.B.'s birth. She told the

hospital that she had gone to a friend's house where she drank some cranberry juice laced with drugs, whereas she told the investigating social worker that she went to a strip club with former coworkers and consumed someone else's drink containing methamphetamines. Mother also admitted using methamphetamines three days before delivering K.B.

Asked about her history, mother explained that she "got caught up at the end of 2007" and tried methamphetamines. She did not use again for a few years. In 2012, she began using "heavily until 2014." Father got her to quit, but she relapsed before delivering K.B. Aware that mother used methamphetamines in the past, father discouraged her from using. He did not see mother using drugs during her pregnancy, although he had his suspicions.

K.B. did not have withdrawal symptoms at birth. At the time of the jurisdictional hearing, he was being evaluated by the regional center to assess the effects of his prenatal exposure to the drug. Toddler N.B. was appropriately dressed, well-behaved, and appeared to be comfortable with mother, who responded appropriately and affectionately.

Mother planned to move to a motel when she left the hospital. However, upon her release, mother promptly enrolled in an inpatient drug rehabilitation program, while denying that she used drugs throughout her pregnancy. A month later, mother was terminated from her rehabilitation program for fighting with another resident. She enrolled in a second treatment program in the beginning of April 2018. There, she attended domestic violence classes, seven Narcotics Anonymous meetings a week, wellness meetings, yoga classes, relapse prevention, seeking safety, mommy and me classes, and

parenting classes. She received certificates of completion for parenting and domestic violence classes in June 2018, after the juvenile court detained the children. She also produced negative drug test results between May and June 2018. The Department recommended that mother's visits no longer be supervised.

The petition under Welfare and Institutions Code¹ section 300, subdivision (b)(1) on behalf of both children alleges as to mother, that K.B. was born with a positive toxicology screen for amphetamines and methamphetamines; mother has a history of illicit drug use including marijuana, amphetamines, and methamphetamines; the children are of tender years and require constant supervision; and mother used illicit substances during pregnancy with K.B.²

II. Father

Father was working in Bakersfield when K.B. was born and could not leave for more than a week. He and mother split up when she became pregnant. Father explained he would see N.B. on the weekends "if not 2 or 3 days longer." He planned to care for the children if mother could not.

Father admitted he occasionally smokes marijuana but denied smoking in N.B.'s presence. He vehemently denied using any other substance. However, he had a .11 percent blood alcohol level on February 27, 2018. In November 2015, father was arrested for disorderly conduct and intoxication. In October 2007, father was convicted of a driving under the influence of

¹ All further statutory references are to the Welfare and Institutions Code.

² The petition also includes allegations that mother has an untreated psychological disorder.

alcohol or drugs. Father also admitted he had a pending charge of driving under the influence in Utah. Father agreed to submit to an on-demand test when he came back to Los Angeles.

Father failed to appear for the scheduled drug test upon his return. He then admitted that he drinks alcohol once a week and smokes marijuana daily, but denied having a substance abuse history. He had a medical marijuana card for 14 years that has expired. Father smokes marijuana to calm himself down, for headaches, and for insomnia. He only smokes after N.B. goes to sleep and does not wake up at night. He keeps his drugs in a sealed container on top of the refrigerator. He stated both that he was willing to stop smoking and that he planned to renew his card.

Father lived with the paternal great aunt and paternal cousin. His house was clean and organized, the utilities were in working order, and there was sufficient food. N.B. was appropriately dressed and appeared comfortable in father's presence. In turn, father was affectionate with her and kept her entertained during the social worker's interview.

Father produced positive test results for cannabinoids on February 27, 2018, again on March 15 and 22, and May 9, 2018. Each test contained higher amounts of the substance than the last. Father failed to appear for four tests in April 2018 and for one in May 2018.

The petition alleges that father has a history of substance abuse and is a current abuser of marijuana. (§ 300, subd. (b)(1).)

III. Procedural history

The juvenile court sustained the petition in its entirety. As for disposition, the court removed the children from mother's custody and placed them with father on the condition that he

drug test and that the Department make unannounced home visits. It ordered mother to participate in a series of reunification programs but gave her credit for programs she had already completed. The court ordered father to undergo 6 random, on-demand drug tests that produced decreasing levels of marijuana. If he missed a test or produced dirty results, then father would have to participate in a full drug rehabilitation program with random testing. The parents separately appeal.

DISCUSSION

I. Jurisdiction

Section 300, subdivision (b)(1) reads, in relevant part, that a child is subject to the jurisdiction of the juvenile court when the child “has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child . . . due to the parent’s . . . substance abuse.” The juvenile court is not required to find that the child was in fact harmed, but only that the child is at “substantial risk” of harm.

The Department has the burden to establish the jurisdictional facts by a preponderance of the evidence. (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1014.) On appeal, “‘we must uphold the [trial] court’s [jurisdictional] findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings.’” (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022.)

A. *Mother*

Mother contends the record contains no evidence that her drug use placed the children at substantial risk of serious harm.

But mother acknowledges that K.B.'s positive toxicology screen at birth was legally sufficient for the juvenile court to exercise jurisdiction. (*In re Troy D.* (1989) 215 Cal.App.3d 889, 899–900 (*Troy D.*.) The harmful effects of prenatal exposure to dangerous drugs are well recognized. (*Id.* at p. 899.) Prenatal drug use is evidence of prior child neglect and probative of future child neglect. (*Ibid.*) *Troy D.* relied on the presumption under section 355.1 that section 300, subdivision (b) applies to a child born with a positive drug test. (*Id.* at p. 897.)

Mother did not rebut the presumption that arose from her prenatal use of methamphetamines. Contrary to her assertion, the record contained more than the acknowledged single instance of methamphetamine use three days before K.B.'s birth. Mother described a history of methamphetamine use dating back to 2007, with heavy use for two years from 2012 to 2014. Furthermore, a reasonable inference from mother's refusal to drug test 10 months before K.B.'s birth is that she knew then that she would produce a positive result. And, mother ingested the drug the night before K.B. was born. The juvenile court did not appear to believe mother's differing stories how she ingested methamphetamines before going into labor. We may not reassess that evidence. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52.) The court could reasonably conclude from mother's past abuse of the drug that her abuse that night was intentional. Maternal uncle's and aunt's ignorance of mother's drug abuse does not negate the fact that mother used a seriously harmful and addictive drug and did so enough that she exposed her fetus to it. Mother's use of

methamphetamines during her pregnancy confirms her lack of judgment and her willingness to endanger her child's safety for a fix.

Although there was no documented evidence that K.B. had suffered physical harm *at birth* from mother's abuse of methamphetamines during pregnancy, the newborn was still undergoing evaluation at the time of the jurisdictional hearing to assess whether he has suffered the effects from his exposure. And, while N.B. had not been harmed, she is a toddler and so mother's drug use is *prima facie* evidence of mother's inability to provide regular care resulting in a substantial risk of harm to N.B. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 767 (*Drake M.*)). "While jurisdiction must be asserted on the basis of conditions which exist at the time of the jurisdictional hearing, the court is not required to disregard the mother's prior conduct. [Citation.] '[P]ast events can aid in a determination of present unfitness.'" (*Troy D., supra*, 215 Cal.App.3d at p. 900.) The juvenile court was not required to wait until a significant risk becomes a serious injury before assuming jurisdiction and acting to protect the child. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194–196.)

The evidence available to the juvenile court at the time of the jurisdictional hearing—that mother has a history of, and an ongoing problem with, methamphetamine and amphetamine abuse; her problem was serious enough to cause her to use the drug while nine months pregnant and to expose K.B. in utero; and both children are extremely young and require constant

supervision—sufficiently establishes that mother’s drug use put the children at “substantial risk” of harm. (§ 300, subd. (b)(1).)³

B. *Father*

Father contends the evidence does not show that he is a substance abuser and does not show the required nexus between his marijuana use and harm to the children. He observes that his house is clean and adequate, and N.B. was comfortable with him. The Department responds that father admitted smoking marijuana on a daily basis and his medical marijuana card had expired.

“[W]ithout more, the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found.” (*Drake M.*, *supra*, 211 Cal.App.4th 754, 764.) That is, a finding of substance abuse is necessary but insufficient for a finding under section 300, subdivision (b)(1). (*Drake M.*, at p. 766.) There must also be evidence of substantial physical danger to the child for the child to be defined by section 300, subdivision (b). (*Ibid.*)

Substance abuse can be found from evidence showing the parent was diagnosed with a substance abuse problem by a medical professional, or from evidence that the parent has “ [a] maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12-month period: [¶] (1) recurrent substance use resulting in a failure to fulfill major

³ Given our conclusion that the children come within the juvenile court’s jurisdiction based on counts b-1 and b-2 concerning mother’s drug use, we do not consider count b-4 concerning mother’s mental health. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.)

role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household); ¶] (2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use); ¶] (3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct); and ¶] (4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights).’ ” (*Drake M., supra*, 211 Cal.App.4th at p. 766.)

Substantial physical danger is found when the children are of “ ‘such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety.’ ” (*Drake M., supra*, 211 Cal.App.4th at p. 767.) The finding of substance abuse in such cases “is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm.” (*Id.* at p. 767.)

The record here contains evidence of life-impacting effects of father’s substance abuse: Father repeatedly drove an automobile when impaired and has had a number of related legal problems for driving under the influence of either drugs or alcohol.

Furthermore, the Department presented evidence that father’s substance abuse poses a substantial physical danger to the children, i.e., that he has exposed them to alcohol or marijuana and is unable to adequately supervise or protect them. Father admitted he smokes in the home where the children live

and so he has already exposed them to secondhand smoke. (*In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 453 [marijuana use posed risk to children from secondhand smoke].) More important, K.B. is an infant who likely will not sleep through the night and was born with a positive toxicology screen for a very dangerous drug. Father's substance abuse poses the risk to these very young children that he will be unable to care for them at night because he is either drunk or high. As we have already stated, the juvenile court was not required to wait until a significant risk becomes a serious injury before assuming jurisdiction and protecting the children. (*In re Heather A.*, *supra*, 52 Cal.App.4th at pp. 194–196.)

Father also challenges the disposition order directing him to undergo six random, on-demand drug tests that produce decreasing levels of marijuana, and to participate in a full rehabilitation program with random testing if he misses a test or produces dirty results. The juvenile court has wide latitude to fashion disposition orders to remediate the problems that led to the children's removal, including requiring a parent to submit to substance abuse treatment, as long as the requirement is designed to address a problem that prevents the child's safe return to parental custody. (*Drake M.*, *supra*, 211 Cal.App.4th at p. 770.) We only reverse the disposition order when faced with a clear abuse of juvenile court discretion. (*Ibid.*) Clearly, no abuse of discretion is shown here as the disposition plan for father directly addresses father's conduct that justify jurisdiction.

II. Removal

Mother contends that the juvenile court erred in removing the children from her custody because the evidence did not

support the finding of substantial danger, and because the court failed to make a reasonable means finding.

A dependent child may not be taken from the parent's physical custody unless "the juvenile court finds clear and convincing evidence [that] [¶] . . . [t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, *and* there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." (§ 361, subd. (c)(1), *italics added.*) Thus, the juvenile court must consider both whether there is a substantial danger to the children if they are left in mother's custody, and whether there are reasonable means by which the children could be protected without their removal from mother.

Additionally, subdivision (e) of section 361 mandates that the court "make a determination as to whether reasonable efforts were made to prevent or eliminate the need for removal of the minor from his or her home" and requires the court to "*state the facts on which the decision to remove the minor is based.*" (*Italics added.*)

The reporter's transcript reflects no finding about reasonable means or reasonable efforts, while the clerk's transcript recites the section 361, subdivision (c)(1) reasonable means finding. Conflicts between the reporter's and the clerk's transcripts are generally resolved in favor of the reporter's transcript, unless the circumstances dictate otherwise. (See *In re Anthony Q.* (2016) 5 Cal.App.5th 336, 343, fn. 4.) Circumstances do not dictate reliance on the clerk's transcript here. The court made *no oral mention* of "reasonable means" or of "reasonable

efforts” made by the Department to prevent removal. Therefore, the juvenile court erred as a matter of law when it made the removal order. (§ 361, subd. (e).)

DISPOSITION

The order sustaining the petition is affirmed. The order removing the children from mother’s custody is reversed and the matter is remanded to the juvenile court to determine whether to remove the children based on present circumstances.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

MURILLO, J*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.